UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
		Docket #17cv2858
DEVPAT AB,	:	
Plaintiff,	:	
- against -	:	
USANA HEALTH SCIENCES INC.,	:	New York, New York
		October 30, 2018
Defendants.	:	
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PROCEEDINGS BEFORE
THE HONORABLE KATHARINE H. PARKER,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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E X A M I N A T I O N S

Witness	Direct	Cross	Re-Direct	Re-Cross
None				

E X H I B I T S

Exhibit Number	Description	ID	In	Voir Dire
None				

THE CLERK: Calling case 17cv2858, Devpat v. USANA Health Services. Counsel, please make your appearance on the record.

MR. RICHARD PETTUS: On behalf of the plaintiff Devpat, Richard Pettus. Good afternoon, Your Honor.

MR. JAMES BURTON: Good afternoon, Your Honor, James Burton and Jeffrey Lindenbaum on behalf of the defendant USANA Health Sciences, also on behalf of the non-parties, Dr. Mehmet Oz and ZoCo Productions LLC. Good afternoon.

THE COURT: Good afternoon. Okay, so this – the issue before the Court are the subpoenas that have been served on ZoCo Productions and Dr. Oz. And the purpose of this conference is to talk about the proposed motions and set a briefing schedule, to the extent that's necessary.

I'd like to hear I guess first with respect to plaintiff why do you, do you think that any of these topics can be narrowed to the extent the third parties have complained about them.

MR. PETTUS: Your Honor, we've obviously looked at that and we even had to reissue subpoenas from, at first we had served Harpo and talked to their counsel. They were all over the website. They told us they didn't

own the rights to the marks. And so we reissued - and we did look at these issues. We took it seriously. But it's all in relevant discovery that we feel that we need. That goes to not only infringement and the scope of the infringement but, more importantly, to willfulness and damages.

THE COURT: Well, it seems to me that some of the items maybe could be obtained first from USA NA Health Sciences, no? So, for example, communications between USA NA and ZoCo and/or Dr. Oz, wouldn't defendant be able to provide you with that?

MR. PETTUS: So they have provided us with some, and, again, when I say some, I think I don't want to overstate or understate, but there's probably about 50 emails that we've gotten. And some do relate directly to the SmartShake product, and I'm sorry that we missed that the way we did with Your Honor's rules on the confidentiality, but we thankfully straightened that out appropriately with counsel.

THE COURT: That's okay.

MR. PETTUS: But, you know, the communications with USANA, again, maybe they've given us everything. We have our doubts --

THE COURT: So it's pronounced USANA not USA

NA? Okay, got it. Thank you.

MR. PETTUS: We have our doubts, and if that's the scope of it, obviously it's not an incredible burden to them 50 emails. What we're really after though are, you know, the internal communications, and even - you know, there's something, I know you're jumping into this as you are and it's definitely appreciated, but obviously there's a whole background to it, and we did our best in the short amount of space we had to describe what we're really after and why it's relevant.

But one thing if I could just two seconds, this case started with Dr. Oz who is, when you talk about a big company, a billion dollar company like USANA, you know, they have advertising firms, he's their main advertiser. And that's not simply why we're going and feel we need this deposition. What happened was, and the way our client became aware of the infringement is Dr. Oz did his show, and we got a call from a consumer saying I saw your product on Dr. Oz's show and I'd like to get it. Can you send it to me? And that's what's called actual confusion under the trademark law, and that's very relevant, and it's relevant not only to generally infringement but also to willfulness.

And we do feel there's a very strong willfulness

claim here because as of today, we printed out the website pages, they're still using the trademark to sell the product. Dr. Oz still has it. And --

THE COURT: Well, so I'm sorry to interrupt you, but I just want to get clarification on the internal communications. You're talking about internal communications within ZoCo, between and among Dr. Oz and others within ZoCo about this product or about potential confusion of consumers. For example, there maybe is some customer line within ZoCo where somebody might've sent an inquiry that would reflect confusion that might not have been shared with defendant. Is that the type of thing that you're looking for?

MR. PETTUS: So you got to my point which I was intending to get to but you got to it much quicker than I did, and I apologize for the sideshow. Yes, that's the additional instances of actual confusion where Dr. Oz, and some of those 50 emails, USANA writes to Dr. Oz and said we showed this coconut oil product and there's some issues that we're hearing about from the public. Are you getting inquiries from the public and can you talk about it? So he's aware of it and it happens and it happened with us, and that's highly relevant factual information.

But then, yes, the other information,

(indiscernible) downplay it, but their internal communications about it wasn't just this one episode, and we keep hearing that and I understand why that's the argument that's being presented. But there was the one show, then there was a sweepstakes that took place over the course of weeks, and they're still promoting it today on the website.

So the other information that is relevant to willfulness, and, again, willfulness, are you doing the infringe - are you infringing intentionally, and that's a factual question, and part of it is based on, okay, when did you become aware that there was this issue, did USANA tell you, did you learn of it otherwise, have you not heard of it until you saw subpoenas, and even if that's the case, what have you done since then. That's relevant because if USANA told them, their reaction, those internal communications are relevant, but also USANA didn't tell them, and you say to yourself there's no burden in producing documents that don't exist, but that's where the deposition's going to come in.

And obviously if USANA didn't tell them while all of this was going on, and when I say all of this, there was a prior Utah suit that they jumped the gun and filed --

THE COURT: Right, I saw that.

MR. PETTUS: And, again, if you're acting in good faith, you take steps to correct or, you know, again, if you're in good faith don't want to infringe a trademark, you do something, and nothing's happened.

And so, again, on some of these issues I'm sure there's internal communications, they would have taken place potentially after the filing of this lawsuit. And when you ask can we get it from USANA, one objection is that, objection that they have imposed across their entire production is we're not going to give you documents that are dated after the filing of the lawsuit. And I understand that, I've done that in the past, and that definitely in some cases makes sense. But here we're talking about a continuing act of infringement, again, and the web pages as of today, the mark is being used on both USANA's and Dr. Oz's website. That's relevant, and it's going to be relevant to the jury --

THE COURT: Well, to the extent it goes to confusion, I would tend to agree. To the extent you're talking about privileged communications, maybe there can be an agreement that you don't have to do a privilege log as to attorney-client communications post the lawsuit, but that's something that is not before me to talk about.

But let me ask you, do you have - is there an agreement between USANA and ZoCo with respect to the promotion and marketing of the product?

MR. PETTUS: There is, yes.

THE COURT: And do you have that agreement?

MR. PETTUS: We do have, we have - it's been renewed, and that's part of how we knew some of the information that was confidential that we put in our letter.

THE COURT: Okay.

MR. PETTUS: Do we have the internal communications and Oz about that? No, we do not.

THE COURT: Does the agreement provide for revenue to the ZoCo for sales?

MR. PETTUS: So the agreement pays Dr. Oz quite a sum of money for his promotional activities, but part of that is also strategic suggestions, strategic evaluation of the product. So whenever there's a new product, they tell him how he's their trusted partner, and he gets that new product into millions of homes. But what goes on behind the scenes is they vet these products, they come up with strategies, and it is not just USANA. The email that we attached at exhibit E is one example that's specific to this product where it was Dr. Oz who was proposing

promotional strategies for this product, and that was followed up on in another email. We only attaché done because it was the most relevant.

THE COURT: All right, this is a little bit different than some other trademark cases that I've seen where there's a reseller basically. And as I understand ZoCo and Dr. Oz's role, it's as an advertiser essentially, a sponsor, and then separately a marketing advisor essentially is what you've described. Is that correct?

MR. PETTUS: So I think it's absolutely correct that that is (inaudible). In terms of whether, you know, obviously he gave away product as part of the sweepstakes, that was through is website, and he's also fielding inquiries, I mean he's the expert on the product. When someone's watching this, and I have to say I've seen some videos - I don't watch his show - but he's touting a product and it's healthy, it's beneficial to you and you're going to lose weight. And consumers, he's got millions of followers, they believe him.

And when they have a question about it, again, we got the call because there was confusion about our product, he gets the call. They don't watch it and put together that this is a USANA product. So our view is that there's some highly relevant information, whatever

you want to call it, customer service, those sort of inquiries which could potentially be very relevant.

In terms of sales, I mean he's given them away, and that was, that's an infringement and that's a problem, he gave away $47,000 worth of product with our trademark on it, and that's still we feel subject to our damages claim. There are products that he does sell. I don't --

THE COURT: Infringing products?

MR. PETTUS: No.

THE COURT: Oh, okay.

MR. PETTUS: So there are other products he does actually sell.

THE COURT: Okay, so in terms of money or, the 47,000 I assume USANA would be primarily responsible for that amount given away.

MR. PETTUS: We have not sued Dr. Oz.

THE COURT: Right.

MR. PETTUS: He was front and center in our complaint because that's what instituted --

THE COURT: Right, I understand.

MR. PETTUS: -- the entire action. We made a tactical - we didn't want to do that.

THE COURT: Right.

MR. PETTUS: My client didn't want to do that.

We haven't done that. I know there was some talk about this trying to be a headline grab. Not at all. There's been no press release. My client just wants to get the evidence they need to try to resolve this case one way or the other and get the compensation, and they're not going after Dr. Oz or ZoCo. They just want discovery from them, that's the subpoenas. The damages, to the extent we can prove it, you know, hopefully we can benefit of the information from ZoCo and Dr. Oz. We'll (indiscernible).

THE COURT: All right, Mr. Burton, are you going to address them?

MR. BURTON: Thank you, Your Honor. I'm going to bounce around a little bit and address some of the issues that you discussed with Mr. Pettus.

THE COURT: Sure.

MR. BURTON: Your first question was can these topics be narrowed, and they absolutely can be narrowed. As we communicated in our briefing, we have a concern fundamentally with the fine term, USANA Shake Products. If you look at it, it's defined to include any product that includes MySmart, and that is overbroad on its face because there's a covenant not to sue Devpat, that they will not sue USANA for its use of the USANA MySmart mark they're using now. That's how the Utah case, that's how

they resolved the Utah case.

So the topic, it's interesting, in the defined, in the definitions of the different subpoenas, the MySmart product is used singularly, but in the actual deposition topics and then the different requests for the document requests, it's used in the plural. So one of the concerns we have upfront is there needs to be an understanding from our perspective that this - to the extent there is discovery, it's limited to the mark issue not the new mark, whether there's a covenant not to sue.

THE COURT: I think from what I've heard and read, I don't think plaintiff would have a problem with that. Is that correct?

MR. PETTUS: And I think that's generally correct, but like everything there's a twist to this. What we've heard from the defendant is that, they gave us some information before they went off and filed the Utah suit, and it was how much they had in inventory. I don't want to say in open court, but it was - our client had a sense of how much had that trademark, and that's a fundamental piece for the damages claim, and I'll just say it's big, and that's why it was an issue. And the concern was we don't want to destroy all that, and they ended up filing their suit, and here we are today before Your

Honor.

Now, what they've told us and what they told Judge Koeltl at a recent hearing is, well, we've changed our packaging. We're not using the mark anymore. However --

THE COURT: You have the inventory.

MR. PETTUS: -- and we've had conversations with counsel. You go on their website, and I have it right here, Your Honor.

THE COURT: I saw the exhibits.

MR. PETTUS: Yeah, I mean we went this morning just to make sure. Did they change it today? Did they change it last week? As of today they're still using the trademark. When you want to click and buy, you know, product X, it has MySmartShake --

THE COURT: So in terms of narrowing to the - but that's still involving the trademark at issue, no?

MR. PETTUS: So if a consumer clicks on that and buys a product, and they ship out a package that is blank, our view is you're still infringing. You're still using our mark in commerce to get that sale. And they haven't changed their website; neither has Dr. Oz. He still has the SmartShake sweepstakes up on his website and links to their website. And so, again, I don't want to -

obviously --

THE COURT: But that's use of the trademark that you're saying is infringing.

MR. PETTUS: Correct.

THE COURT: So are you objecting to questions about use of that trademark --

MR. PETTUS: No.

THE COURT: -- on the website or on packaging or bottles?

MR. BURTON: To be clear, what we don't want to be under obligation to do is produce sales information, communications regarding our current use, which we have a covenant not to sue or they won't sue us for that use, and the way the definition --

THE COURT: Current use of a different trademark.

MR. BURTON: Different trademark. So it's really confusing because --

THE COURT: Current use of the trademark that's at issue in this case is not part of the stipulation.

MR. BURTON: That's not what I'm talking about. I'm talking about the new use of MySmart --

THE COURT: Right.

MR. BURTON: -- and MySmart is an acronym, and

I can't remember what it stands for. What I don't want to do is put my client in a position where they're obligated to produce information that is not relevant to that case. If it's relevant to the new mark, USANA MySmart, that's not at issue in this case, we have a covenant not to sue, and we would submit any request or attempt to obtain that information is contrary to the grounds under which they proceeded to get the Utah case dismissed with the covenant not to sue.

THE COURT: All right, from what I'm hearing it doesn't sound to me this is a big area of disagreement, but go ahead, Mr. Burton.

MR. BURTON: All right, thank you, Your Honor. The other thing is --

MR. PETTUS: I'm sorry, Your Honor. If I might, and I can address it after if you'd rather hear --

THE COURT: Yeah, let me hear Mr. Burton, and then you can address.

MR. PETTUS: I apologize.

MR. BURTON: Your Honor, you talked about communications. This is a - this product was advertised one time on Dr. Oz. That's not in dispute. There may have been supplemental efforts, a sweepstake, and maybe put on line through YouTube or other instances. There's

one instance of this product on Dr. Oz. I've actually never seen a Dr. Oz show other than in connection with this case, but I understand, like Mr. Pettus, enough to know that he advertises multiple products, not just for USANA but for all sorts of additional people in addition to interviewing folks and doing health things.

So it's not unreasonable to think that there would only be a limited number of communications on this one product. It's on a one-time show, it's not the entirety of the show. It's a portion of the show. And we have searched and there's been no allegation that we haven't provided the responsive emails, for example, that we've searched for. And we have more emails that are coming. As I indicated to Mr. Pettus last week, we have supplemental production that's coming.

Rule 45 is very clear. If they can obtain this information from us, they first need to see if they get it from us. It's not enough to just say, well, we don't have a dispute, that it's been provided, but we don't know, therefore, we want to ask for it. That's not what the law provides for.

There was an allegation made that Dr. Oz is our main advertiser, and that's not accurate at all. Our main advertiser are our hundreds of thousands of distributors

throughout the country and throughout the world.

THE COURT: Those are private distributors.

MR. BURTON: Exactly. There's people that invite my wife, for example, over to a house party to do their thing. That's our main source of advertising, it's not Dr. Oz, it's our distributors. So the fact that our product is advertised on Dr. Oz in addition to multiple other products is not sufficient to overcome the fact that that's not our primary way of doing it.

This goes back to what I said earlier, and that is we advertise, as the Court has been informed, multiple products on Dr. Oz show. If the current definitions are kept, the burden on Dr. Oz, on ZoCo, and, frankly, on USANA with respect to discovery requests that are not before Your Honor would be tremendous because we're taking a very, very small portion of a very big pie and being forced to produce the entire pie when it's not an issue, if the subpoenas were enforced as written.

With respect to actual foundation, this is puzzling to me, but this source of actual confusion is the basis for this lawsuit. They've got some lady, as they describe her in their email, they don't know her name, they don't know her number, they don't know her email address, it's a self-serving email from a Devpat employee

to a Devpat employee saying somebody called us about this product. I think they need to be – and the Court needs to be careful the weight ascribed to that call because fundamentally that's not a call that's going to come in as evidence because they can't demonstrate even who made the call or that the call was made or what was discussed during the call.

THE COURT: Well, in term – so I'm not sure what you say is correct because plaintiff would be able to explain how this issue first came to their attention.

MR. BURTON: I think they would --

THE COURT: That's not a hearsay issue I don't believe. Maybe that email itself doesn't come in or maybe it does. That's not before me.

MR. BURTON: Fair enough, and that issue to me, I actually don't think the actual confusion issue has any bearing on what the Court does today because I think it's this, it's a self-serving, uncorroborated, unsubstantiated, it lacks foundation, etc. And I think it will cause, from an admissibility standpoint, I think it's problematic. But I don't think it's relevant for purposes of what the Court is doing today.

Let me address willfulness. Mr. Pettus discussed at length that all this information is related

to willfulness, but nothing that they're talking about, Dr. Oz isn't going to be willfully, isn't going to be a rival for willful infringement because he's not a party. He gave away product that was given to him; he didn't sell it. He has no revenue from this other than what is paid to him by USANA, and USANA doesn't pay him - they pay him a lump sum, as I understand it, not product specific, to advertise their products.

So whether or not Dr. Oz, the sweepstake winners, Dr. Oz's staff, ZoCo knew about the Utah case, about the Utah dismissal, about the fact that we're in this case isn't relevant. What's relevant is what did USANA know. Did USANA know that its infringement was - it was on notice and, therefore, that there's an issue with infringement. And I just think that's a bridge too far to gap between, a gap to far to bridge, between what Mr. Pettus is saying about the relevance about Dr. Oz's knowledge or anybody else's knowledge that's a third party other than USANA. I don't think that goes to willfulness.

One of the things that Mr. Pettus raised is documents created after the lawsuit. Your Honor hit it right on the head. Our agreement, our representations were limited strictly to attorney-client privilege, not documents that exist in the regular course of business.

With respect to the other issues that we have concerns with is this is, there are 17 topics to a non-party. That is grossly on its face overbroad, not only the deposition topics, but also the different document requests. I think it's also very common in this instance, and I think it perhaps belies some of counsel's representations, all this information can be obtained from a properly prepared 30(b)(6) witness.

We're not standing here before the Court, we haven't said this in our papers and I'm not saying it today, that there isn't any information here that's relevant or that's discoverable. I understand that some of it may be, but it can be obtained from the entity. It doesn't need to be obtained from Dr. Oz. And it can be narrowed so that it's actually relevant to the issues at hand and not so broad that the parties, that it puts an undue burden on third parties who aren't a part of the litigation.

I'd be happy to go through the different topics and express topic by topic the concerns that we have. I'd also be happy to brief it if the Court wants us to. I think on the its face I can identify several topics that have no relevant. For example, I don't think that the Utah lawsuit or the dismissal order have any relevance to

this case going forward because willfulness is evaluated through the lens of USANA. I also don't think that any agreements or revenue paid is relevant. That's under topic 5. Trademark evaluations, if those occurred, they would've occurred under an attorney-client privilege, if they even exist. I mean I can go through several others, and obviously we have concerns.

So, for example, if you look at topic 7, each episode of the Dr. Oz show, and then it has some included but not limited to the one episode on which our product was featured. So we are required then to prepare a witness for each episode of the Dr. Oz show, and I don't think that's what they're intending. Maybe it is, I don't think it is, but it certainly creates a problem for preparing a witness.

And so if the Court wants, I could gladly go through others, but I think the Court understands the issue that this is - there's discovery here to be had, and we don't dispute that, but I think it should be narrowed to the entity and the topic should be narrowly tailored to the issues that are actually involved in this litigation.

THE COURT: Mr. Pettus.

MR. PETTUS: Sure, Your Honor. Would you like me to address it in any order? I have my notes.

THE COURT: Yes, go right ahead, any order is fine.

MR. PETTUS: Okay, so just starting from the last point which is we can narrow this to just the entity and not Dr. Oz. There's some real issues with that. I mean we included in our letter, which sometimes it's hard to pick up, we met and conferred on this, and we asked counsel, and, again, at that time our understanding was he was not representing Dr. Oz, and apparently he is now, but we said is USANA going to call him as a witness at trial. And his response is I can't tell you one way or the other. (indiscernible) a witness, there's just no doubt about it, and, again, I'm not standing on we're entitled to it, but when we do --

THE COURT: If he's going to be called as a witness, and if he was identified as a witness, I tend to agree that you should be permitted to depose somebody who's listed as a person with knowledge and information and a witness.

MR. BURTON: And to be clear, Your Honor, he's not listed by us in our initial disclosures, and I think that the initial disclosures, we've raised issues with the absence of specificity in the initial disclosures. It's been raised on both sides. We don't have him listed, and

it's not enough to say we don't know at this point, frankly, if we're going to call him as a witness because I don't see yet how he's relevant.

THE COURT: So he hasn't been listed.

MR. BURTON: Not by us. He's been listed by them --

MR. PETTUS: Well --

THE COURT: Oh, okay.

MR. PETTUS: No, the question again, I'm sorry, I did not --

THE COURT: I misunderstood what you said.

MR. PETTUS: I was not clear. It wasn't that he was listed. And we asked him he's a fact witness, he's relevant in our view. We listed him, and we asked him, well, you know, their objection was why are you taking Dr. Oz's deposition? We laid out all the factual reasons and relevancy, and we asked are you saying you're not going to call him, and they wouldn't commit to something like that. I don't even that would do it because, again, we hadn't seen internal documents. From what we have seen, he has relevant input to every single product. Again, the one that we gave to the Court he's suggesting strategies for this product.

THE COURT: Strategies in terms of sales and

marketing, is that correct?

MR. PETTUS: Correct, which involves use of the trademark. And it was after we had contacted USANA about the alleged infringement. We contacted them in July of 2016. After that point in time, Dr. Oz is proposing new, different additional promotional strategies for this product. So, again, relevant that – and it's his slide deck. That's what the email says. And that's the one email that we have. Internally, again, when you hear the willfulness is only whether or not USANA is willful. The question is not whether or not – is not just what USANA has done, but it's also – I'm sorry, the question is really what has USANA done for willfulness, right, so is USANA aware? I think counsel said the question is whether USANA knows what, you know, that there's an infringement issue.

That's part of it, and that's obviously an important part of it because without knowledge you can't accuse someone of being intentional and willful. The real willfulness though and just as important is what did you do after you learned of that, and, again, I've heard that it's not Dr. Oz who's their primary advertiser; it's their distributors. They don't pay those distributors to advertise. They give them compensation for selling. They

don't pay a cent for advertisement. They pay Dr. Oz a lot of money to advertise. And if you've read our paper, how they tout is true. It's how they get in, it's an exclusive club, they pay to be exclusive, it's really important, and he's not just some star that sits on the sidelines. He's involved.

And, again, I mean that's the relevancy. I'm not sure, I'm just trying to look real quick.

THE COURT: Well, for example, in topic 7, each episode of the Oz show, you don't need every single episode of the Oz show?

MR. PETTUS: No, of course not. No, no. And, again --

THE COURT: But that's how your topic is written.

MR. PETTUS: If you go on though, and let me pull that out --

THE COURT: I have "each episode, original production and re-run thereof of the Dr. Oz show, including but not limited to the Dr. Oz SmartShake episode, on which a USANA shake product was featured, advertised, promoted, or otherwise mentioned." So the way that this is written, it's not limited to programs involving the SmartShake.

MR. PETTUS: Your Honor, I just respectfully read it a different way, and, again, it does say including but not limited to the Dr. Oz SmartShake episode which is the one that we're, you know, again, was the one that caused the actual confusion. But then when it goes on, the including but not limited to is that one episode, but it is limited to each episode on which a USANA shake product is featured. So, again --

THE COURT: But you're not interested in all USANA shake products. You're only interested in USANA shake products that they're the infringing mark.

MR. PETTUS: That USANA shake product is defined specifically as those products that use the MySmart mark.

THE COURT: Okay, because I thought that the third parties were objecting to that definition as being broader than just that. Did I mishear you or --

MR. BURTON: No, Your Honor, in fact, let me read the definition. "USANA shake product," this is from 65-1, page 6, paragraph 7, "USANA shake product shall mean each shake related product sold by USANA under the name MySmart." (indiscernible) both the accused product or the accused use and the product covered by the covenant not to sue.

THE COURT: And what I'm looking, when I'm looking through the document requests on subpoena, there are a number of these requests where you're asking for all documents and things concerning, going on. And it seems to me that some of those may be able to be tailored. I do see that you have the last one documents sufficient to identify, but you don't have that kind of language in the other requests. So they are broad. I understand they're targeted, but they are broad.

So I'm just wondering, you said that there was a meet and confer, but you weren't able to resolve the issues. I guess I have some of the correspondence from before, but it seems like you might be able to meet and confer on a little bit more, at least narrow the issues for briefing. Because with regard to the definition of the infringing mark and with regard to what episodes, for example, those are just two examples where it seems like there may be, you may be able to avoid some briefing on some of those things.

So what I think based on this conference is that you should perhaps have an opportunity over the next week to meet and confer to see if there's any way you can just narrow this a little bit more, and to the extent there are specific issues - I understand the issue of Dr. Oz is

probably not going to be agreed to. You believe he's relevant, you believe he's not relevant, and there's going to need to be briefing on that. But it may be that you can narrow the specific topics that are listed as the deposition topics and the production requests that are really at issue for me to resolve. So I think you should have the benefit of about a week to do that, and then we set a briefing schedule.

Have you all talked about a resolution of this matter?

MR. BURTON: I don't think a resolution of this matter is something that USANA is interested in discussing at this point.

THE COURT: Okay.

MR. BURTON: It's been floated, but my marching orders were to come here today and so --

THE COURT: Okay, this case has only been referred to me for settlement of this particular issue, but to the extent that you do want me to assist with settlement, you can certainly request that.

MR. BURTON: Thank you, Your Honor.

MR. PETTUS: Yes, Your Honor, and, Your Honor, if I might, and, again, I don't know if it helps matters, but it's been more than floated before the Utah suit got

filed, and if you read the court's decision on that, and the reason why, there were two reasons why it got kicked out. There was procedural fencing.

THE COURT: Right, I saw that.

MR. PETTUS: We had --

THE COURT: I mean I saw the decision that you attached.

MR. PETTUS: Where essentially we had reached an agreement we felt we had on a settlement, and our client would've been fine. There was one issue left, and they said we'll get back to you, and instead they sued us. Since then we've tried, but counsel, he's got his marching orders. There's been no progress since then.

MR. BURTON: I wasn't involved at all in any of the pre-filing discussions. So my scope is limited to my actions.

THE COURT: Okay, so let's just set a schedule, and I'll try to resolve this as expeditiously as possible. So I'm going to give you a week, that is, until November 6 to meet and confer and to hone in on those specific numbered requests that you're fighting about or the bigger issue of just whether Dr. Oz should be deposed or individually be required to answer any of the document requests as opposed to ZoCo.

And, by the way, I don't know if there was, if ZoCo's identifying somebody to testify, for example, who it would identify, if it would identify Dr. Oz, then maybe it's a, maybe it's not worth fighting about Dr. Oz. But I'll leave that up to you to talk about over the next week. So talk about it over the next week. And then the motion for a protective order I think that should be filed the following week, so by the 13th. Is that enough time?

MR. BURTON: That's fine, Your Honor.

THE COURT: And then that will give you a week to respond?

MR. BURTON: Yes, Your Honor.

THE COURT: So that will be before Thanksgiving so your Thanksgiving is not ruined.

MR. BURTON: Thank you.

THE COURT: And then I'll take a look at it. Now, if, again, if in your meet and confers you want to talk about a potential resolution instead of your client spending a lot of money on litigation and briefing, say that you've met me and that, you know, you can request a mediation before me, and I'd be very happy to try to help you to do that before you spend more money and are off to the races. Many trademark cases, as you probably both know, are resolved through settlement. So I offer that to

you as something to think about. Okay.

MR. BURTON: Thank you, Your Honor, much appreciated.

THE COURT: All right, so I'll issue an order setting this schedule and nice to meet you --

MR. BURTON: Just a point of clarification.

THE COURT: Sure.

MR. BURTON: Under your schedule, are we entitled to a reply or you want just a motion and an opposition?

THE COURT: I don't think a reply is going to be needed.

MR. BURTON: If there are issues, would it be all right with Your Honor if we see what they file, and to the extent we want a reply, we can send you a letter --

THE COURT: Yes.

MR. BURTON: -- and explain the narrow scope of a reply --

THE COURT: Yes.

MR. BURTON: I understand that the Court doesn't necessarily want one, we'll articulate why we feel we need one.

THE COURT: Yes, that's fine.

MR. BURTON: Okay.

MR. PETTUS: Actually, it raises a good point, and I'm sure it's in Your Honor's rules, but in terms of length, is there any minimization of that that you'd like.

THE COURT: So, well, I like it as short as possible.

MR. PETTUS: I think we all do.

THE COURT: Twenty pages, is that sufficient? More than sufficient, right?

(interposing)

MR. BURTON: The reason which I think 20 is okay is because there are 17 topics.

THE COURT: Right.

MR. BURTON: And so I don't --

THE COURT: You don't have to - you can just append the requests --

MR. BURTON: Understood.

THE COURT: -- and you don't have to list them all in your actual briefing. So if it can be shorter than 20 pages, I'd appreciate it, but I want to give you sufficient space.

MR. BURTON: Thank you, Your Honor.

THE COURT: Okay?

MR. PETTUS: Thank you, Your Honor.

MR. BURTON: Very much appreciate it.

THE COURT: All right, anything else?

MR. BURTON: No, Your Honor.

MR. PETTUS: No, Your Honor.

THE COURT: All right, nice to meet you all.

MR. PETTUS: Nice to meet you too, thank you. Have a nice day.

THE COURT: You too.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Devpat v. USANA Health Sciences, Docket #18cv2858, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: November 3, 2018